

DANIEL G. BOGDEN
United States Attorney
CRISTINA D. SILVA
Nevada Bar #13760
ELHAM ROOHANI
Nevada Bar #12080
Assistant United States Attorneys
501 Las Vegas Blvd. South, Suite 1100
Las Vegas, Nevada 89101
(702) 388-6338
cristina.silva@usdoj.gov
elham.roohani@usdoj.gov

Attorneys for Plaintiff
United States of America

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAN ROUVEN FUECHTENER,

Defendant.

2:16-cr-00100-GMN-PAL

RESPONSE TO
DEFENDANT'S MOTION FOR
SCENE VIEWING (ECF No. 78)

The United States of America, through the undersigned, respectfully responds to the Defendant's Motion for Scene Viewing. ECF No. 78. For the reasons set forth below, the Government respectfully requests that this Honorable Court deny the motion.

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STATEMENT OF RELEVANT FACTS

A. PROCEDURAL FACTS

On March 30, 2016, a federal Grand Jury sitting in Las Vegas, Nevada, issued an indictment against the defendant, Jan Rouven Fuechtener, charging him with one count of Possession of Child Pornography, in violation of Title 18, United States Code, Section 2252A(a)(5)(B); one count of Receipt of Child Pornography, in violation of Title 18, United States Code, Section 2252A(a)(2) and (b); one count of Receipt of Child Pornography, in violation of Title 18, United States Code, Section 2252A(a)(2) and (b); and one count of Advertising of Child Pornography, in violation of Title 18, United States Code, Section 2251(d)(1)(A). The indictment also contains forfeiture allegations pertaining to the child pornography allegations.

B. SUBSTANTIVE FACTS

In August 2015, a Task Force Officer (TFO) from the FBI Buffalo Field Office Child Exploitation Task Force (CETF), operating in an undercover capacity, was accepted into the network of an individual utilizing the user name “Lars45” on the GigaTribe peer-to-peer (P2P) file-sharing network.

GigaTribe is a publicly available peer-to-peer (P2P) file sharing program that allows one person to share his or her computer files with another person over the internet. The shared files can contain video, audio, or image files. Unlike other programs like Dropbox, GigaTribe does not host the files, but rather the files remain on the user’s own computer. Thus, each computer in the network stores its own files and runs its own applications. One benefit of the software is that it allows users to invite other people, i.e. “friends” in their “tribe,” to view and download from specific password protected

1 folders. GigaTribe has become a favored method for sharing illegal materials such as
2 child pornography because it limits who can download from the user by requiring actual
3 contact between users to obtain the password for each folder. This actual contact can be
4 happen within the GigaTribe chat function or on other platforms, such as Skype or
5 Grindr. GigaTribe is also preferred because it allows likeminded friends to obtain
6 passwords to the folders, and view files before deciding to download the files.

7 The Lars 45 tribe that the TFO joined had been previously identified as being
8 associated with exchanging child pornography. On August 4, 2015, through a chat
9 message within the GigaTribe P2P file sharing program and within the child
10 pornography interest network, Lars45 initiated contact with the TFO and provided the
11 password to his locked shared folders on GigaTribe. The TFO was able to browse
12 Lars45's shared directories and observed thumbnail previews of many images/videos of
13 child pornography, as well as file titles indicative of child pornography.

14 On September 14, 2015, the TFO signed on to GigaTribe and observed that Lars45
15 was again logged into the network. Using the password previously supplied by Lars45,
16 the TFO successfully downloaded numerous files of child pornography from the password
17 protected folders Lars45 was sharing. The files of child pornography were from one IP
18 address. In this case, the IP address that provided the password to the child
19 pornography files was determined to originate from [REDACTED]
20 [REDACTED] ("the Residence"). Subpoenas sent to GigaTribe revealed that the
21 account had an email address of larsschmidt22@hotmail.com.
22

23 ¹ Redacted pursuant to Court Order. ECF No. 83.
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1 in favor of of granting the motion.

2 ...

3 **1. There is no relevant basis to view the defendant's home.**

4 Only relevant evidence is admissible. Fed. R. Evid. 402. Evidence is relevant if
5 “it has any tendency to make a fact more or less probable than it would be without the
6 evidence” and “the fact is of consequence in determining the action.” Fed. R. Evid. 401.

7 To prove the charged crime of possession of child pornography, the Government
8 must show that the defendant knowingly possessed child pornography that had traveled
9 in interstate commerce. 18 U.S.C. § 2252A(a)(5)(B). To prove the charged crimes of
10 receipt and distribution of child pornography, the Government must show that the
11 defendant knowingly received and distributed child pornography that had traveled in
12 interstate commerce. 18 U.S.C. § 2252A(a)(2) and (b). To prove the charged crimes of
13 advertising of child pornography, the Government must show that the defendant
14 knowingly made or published, or caused to be made or published, a notice and
15 advertisement offering to exchange, display, distribute and reproduce child pornography
16 that had traveled in interstate commerce. 18 U.S.C. § 2251(d)(1)(A).

17 As the defense is well aware from the voluminous discovery provided by the
18 Government, the facts of this focus *entirely* on internet and computer files. The
19 Defendant asserts that “[t]he trier of fact will be aided greatly if given the ability to see
20 the defendant’s home.” ECF No. 78. What the defense fails to meaningfully address is
21 *how* the finder of fact would be aided in seeing “the sheer enormity of the residence or
22 spatial reference of the vantage points in the home” for a case that involves only internet
23 downloading and advertising of child pornography. *Id.*

1 The defense has failed to identify any revelant basis upon which the Court could
2 grant its motion, and cannot identify any relevant basis because the size of the house is
3 not probative of any fact of consequence. Fed. R. Evid. 401, 402. How big a house the
4 Defendant lived in is immaterial to the issue of whether the Defendant, via the internet,
5 did knowingly possess, receive, distribute, and advertise child pornography. 18 U.S.C. §
6 2252A(a)(5)(B); 18 U.S.C. § 2252A(a)(2) and (b); 18 U.S.C. § 2251(d)(1)(A).

7 **2. Even if the size of the house is relevant, a viewing is unnecessary.**

8 Even relevant evidence may be excluded if its probative value is substantially
9 outweighed by a danger that admission of the evidence would be cumulative, confuse the
10 issues, or mislead the fact-finder. Fed. R. Evid. 403.

11 Assuming *arguendo* that the size of the house is relevant to something in this
12 case, the Defendant offers no explanation why a to-scale diagram of the house is
13 insufficient to allow the fact-finder to “understand the layout and vantage points of the
14 residence.” ECF No. 78. Indeed, the Government intends to introduce a diagram of the
15 home, which effectively and efficiently gives the fact-finder an understanding of the
16 layout of the home and spatial reference of the vantage points in the home, and which
17 will indicate where each device that contained child pornography was found within the
18 home. Once the Government introduces the diagram in its case-in-chief, the Defendant’s
19 request becomes cumulative and impertinent.

20 In any event, requiring the fact-finder to view the size of a home, confuses the
21 very limited issues in this case that involve an “online” or “computer-based” crime scene.
22 The Supreme Court has noted that “[t]he mere bringing of a jury to a particular place,
23 whether a building or a room or a wall with a bullet hole, is in effect a statement that
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1 this is the place which was the scene of the offense. . .” *Snyder v. Massachusetts*, 291
2 U.S. 97, 110 (1934) (abrogated on other grounds by *Malloy v. Hogan*, 378 U.S. 1 (1964)).

3 Forcing the fact-finder to view a home suggests that “this is the place which was
4 the scene of the offense. . .” *Id.* But, in this case, the “crime scene” is a computer, or
5 online, in cyberspace. At a minimum, viewing the Defendant’s home in this case would
6 confuse the issues or mislead the jury into thinking that where the Defendant lives, the
7 size of his home, how his home is architecturally designed, or what type of furnishings
8 he keeps are relevant to this case. They are not, and granting the motion will only
9 encourage a distracting field-trip sideshow. The motion should be denied.

10 **3. Even assuming that the evidence is relevant, and otherwise**
11 **admissible, the factors do not weigh in favor of granting the motion.**

12 No binding authority has set forth a comprehensive set of factors for the Court’s
13 consideration, but the factors set forth by the Defendant do reflect a compilation of
14 factors used by courts across the country. In considering those five factors, the Court
15 may exercise its wide-latitude and deny the motion.

16 a. Cumulative Evidence

17 Relying on Federal Rule of Evidence 403, the Fifth Circuit considered whether
18 evidence that would be cumulative or prejudicial should be admitted. *See Johnson v.*
19 *William C. Ellis & Sons Iron Works, Inc.*, 604 F.2d 950, 958 (5th Cir. 1979), *as amended*.
20 In *Johnson*, a mother brought a next-of-kin civil lawsuit for damages when her son died
21 as a result of injuries from a cotton compress. *Id.* at 952. One of her appellate challenges
22 focused on the district court’s denial of her motion to admit video of the accident or to
23 allow the jury to view the cotton press in operation. *Id.* at 958. The Fifth Circuit upheld
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1 the denial as both cumulative (as to the videos) and prejudicial (as to the site viewing).
2 *Id.* The Court reasoned that while the “film might have been more graphic,” the evidence
3 was cumulative because the operation had already been fully described. *Id.* The Court
4 further held that because guards had been installed since the accident, the site viewing
5 would have been prejudicial. *Id.*

6 As discussed above, the Government intends to introduce a diagram of the home
7 in its case-in-chief, which will make the Defendant’s request cumulative. While the site
8 viewing might be more “graphic,” it will undoubtedly be cumulative. Moreover, it is
9 entirely unknown what state the home is in, or what the Defendant’s husband removed
10 from the residence during the pendency of this case. Accordingly, this Court may also
11 determine that the viewing would be prejudicial if the site has been modified in any way.
12 Thus, this Court may determine that this factor weighs against granting the motion.

13 b. Unwarranted Delay and Inconvenience

14 The Ninth Circuit has also considered site viewing in the context of delay and
15 inconvenience, in light of other evidence presented. *See Hametner*, 361 F.2d at 445–46.
16 *Hametner* was a civil case involving a collision between a motorcycle and a truck. *See*
17 *id.* at 445. After the district court denied his motion to allow the jurors view the accident
18 scene, Hametner appealed. *Id.* The Ninth Circuit upheld the district judge’s decision on
19 the basis that the introduced evidence “included photographs and a surveyor’s diagram
20 of the scene,” and thus, viewing the scene “with its attendant delay and inconvenience,
21 was unnecessary and unwarranted.” *Id.* at 446. While not explicitly stated, the Ninth
22 Circuit’s reasoning also reflected consideration of cumulative evidence. *Id.*

1 *Hametner* is especially instructive considering that the Government’s case-in-
2 chief will include photographs and a diagram of the scene. Once this evidence is
3 introduced, the conclusion of *Hametner* logically flows --- viewing the scene “with its
4 attendant delay and inconvenience, [is] unnecessary and unwarranted.” *Id.* This factor,
5 too, weighs against granting the motion.

6 c. Prejudicial Comments or Conditions

7 The Seventh Circuit has had occasion to consider site viewing in the context of a
8 § 2254 habeas petition. *See Lopez v. Thurmer*, 573 F.3d 484, 494 (7th Cir. 2009). In
9 *Lopez*, the Seventh Circuit held that it was not “contrary to,” and an unreasonable
10 application of “clearly established federal law,” when the district court allowed a site
11 viewing with heightened security measures in effect. *Id.*

12 *Lopez* offers little in way of guidance based upon the unique strictures of habeas
13 review under the the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).
14 Indeed, the Seventh Circuit considered whether any clearly established Supreme Court
15 authority specifically held that the presence of security of a jury’s site viewing violated
16 the Defendant’s constitutional rights. *Id.* The Court recognized the “restrictions
17 imposed [] by the federal habeas statute.” *Id.* at 493. As those restrictions are not
18 present here, this factor is inapplicable.

19 However, to the extent that the Court does consider this factor, it too weighs in
20 favor of denial. The Defendant suggests that there “would not be any outside influences
21 at the location during the viewing and only court staff and the parties would be present.”
22 ECF No. 78. What the Defendant fails to consider is that (1) the Defendant is in custody
23 and would need to be brought to the site courtesy of the United States Marshals Service,
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1 restrained to ensure the safety of the Court, the Marshals, the jurors, Government
2 counsel, and defendant's attorneys; and (2) the jurors once impaneled, or the Judge,
3 would need to be transported to the site courtesy of either the Federal Protective Service,
4 the Courthouse Security Officers, or the United States Marshals Service.²
5 Notwithstanding the utmost professionalism shown by Federal Protective Service, the
6 Courthouse Security Officers, and the United States Marshals Service, there is zero
7 guarantee that there would not be prejudicial comments during the transport, and or
8 the restraint conditions of the Defendant would not amount to a prejudicial condition.
9 Thus, this factor weighs against granting the motion.

10 d. Change in Appearance

11 The First and Sixth Circuits have looked to whether the premises are in the same
12 condition since the events in question. *See Dugas v. Coplan*, 506 F.3d 1, 12 (1st Cir.
13 2007)³; *Nw. Nat. Cas. Co. v. Glob. Moving & Storage Co.*, 533 F.2d 320, 323 (6th Cir.
14 1976). In both cases, the site was relevant and necessary to the theory of the case. *Id.*
15 In both cases, the standard of review was clear error, or prejudicial error. *Id.* Notably,
16 in *Northwestern National*, the opposing side knew about the changes to the site, but still
17 did not appear or object to the site view. *Nw. Nat. Cas. Co.*, 533 F.2d at 323.

18 Unlike in *Dugas* and *Northwestern National*, the Defendant's house is not
19 relevant or necessary to any theory of the case. The size of the house, no matter how
20 palatial it might be, has no bearing on whether the defendant downloaded and
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23 ² There is the additional burden that a court reporter would need to be present, as well.

24 ³ *Dugas* is a criminal habeas case not subject to the AEDPA parameters of review.

1 advertised child pornography from a computer connected to the internet. Importantly,
2 unlike *Northwestern National*, the Government has not had an opportunity to inspect
3 the house since the execution of the search warrant and has no confidence in the fact
4 that the Defendant's husband, who abruptly left the United States on the eve of the
5 Defendant's first trial setting date, has not altered the house.⁴ This factor also weighs
6 against granting the motion.

7 e. Tampering with the Site

8 The First Circuit, in the context of a civil personal injury case, has also considered
9 whether a juror's experimentation during a site view, by "scuffing the stairway with the
10 sole of a shoe" to test the negligent maintenance claim, resulted in prejudice. See
11 *Clemente v. Carnicon-Puerto Rico Mgmt. Assocs., L.C.*, 52 F.3d 383, 387 (1st Cir. 1995)
12 *abrogated by United States v. Gray*, 199 F.3d 547 (1st Cir. 1999). Notably in *Gray*, the
13 First Circuit reversed course and explicitly undermined its holding in *Clemente* by
14 holding that a site view constitutes evidence subject to all the Rules of Evidence, whereas
15 in *Clemente* the site view was not evidence but was only used "as an aid to help the trier
16 of fact understand the evidence." *Gray*, 199 F.3d at 549.

17 The Defendant's reliance on *Clemente* in light of its definitive abrogation by *Gray*,
18 and the explicit undermining of its reasoning, proves fatal to his argument. But, even
19 assuming that *Clemente* has some continuing validity, the Defendant fails to explain
20 how viewing the size of the home will aid the trier of fact to determine whether or not
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23 ⁴ This is in addition to the fact that the Defendant's husband gave a demonstrably false
24 explanation to local media about why he was abruptly leaving.

1 the Defendant used a computer connected to the internet to download and advertise child
2 pornography. Without this threshold showing, he does not even reach the factor in
3 articulated in *Clemente*. Thus, this factor is irrelevant, or weighs in favor of denying
4 the motion.

5 **CONCLUSION**

6 Because the Defendant has failed to make a threshold showing of relevance for
7 admissibility, because the evidence would be cumulative, confusing, or misleading to the
8 fact-finder, and because the factors weigh against the Defendant's position, the
9 Government respectfully requests that this Honorable Court deny the motion.

10 DATED this 29th day of September, 2016.

11 DANIEL G. BOGDEN
12 United States Attorney

13 //s//

14 CRISTINA D. SILVA
15 ELHAM ROOHANI
Assistant United States Attorneys